



Rule(s) Review Checklist Addendum
(This form must be filled out electronically.)

This form is to be used only if the rule(s) was/were previously reviewed, and has/have not been amended/repealed subsequent to that review.

All responses should be in **bold** format.

Document(s) Reviewed (include title): **WAC 458-20-170 (Constructing and repairing of new or existing buildings or other structures upon real property.)**

Date last reviewed: **1999**

Reviewer: **Mark Mullin**

Date current review completed: **April 17, 2003**

Briefly explain the subject matter of the document(s):

WAC 458-20-170 (Rule 170) provides information about the tax-reporting responsibilities of persons who perform construction or repair of new or existing buildings or other structures upon real property. The rule includes information about the taxability of prime contractors, subcontractors, and speculative builders.

Type an "X" in the column that most correctly answers the question, and provide clear, concise, and complete explanations where needed.

1. Public requests for review:

YES	NO	
	X	Is this document being reviewed at this time because of a public (e.g., taxpayer or business association) request?

If "yes," provide the name of the taxpayer/business association and a brief explanation of the issues raised in the request.

2. Related statutes, interpretive and/or policy statements, court decisions, BTA decisions, and WTDs: (Excise Tax Advisories (ETAs), Property Tax Advisories and Bulletins (PTAs/PTBs), and Interim Audit Guidelines (IAGs) are considered interpretive and/or policy statements.)

YES	NO	
	X	Are there any statutory changes subsequent to the previous review of this rule that should be incorporated?
X		Are there any interpretive or policy statements not identified in the previous review of this rule that should be incorporated? (An Ancillary Document



		Review Supplement should be completed for each and submitted with this completed form.)
	X	Are there any interpretive or policy statements that should be repealed because the information is currently included in this or another rule, or the information is incorrect or not needed? (An Ancillary Document Review Supplement should be completed for each and submitted with this completed form.)
	X	Are there any Board of Tax Appeals (BTA) decisions, court decisions, or Attorney General Opinions (AGOs) subsequent to the previous review of this rule that provide information that should be incorporated into this rule?
X		Are there any administrative decisions (e.g., Appeals Division decisions (WTDs)) subsequent to the previous review of this rule that provide information that should be incorporated into the rule?
X		Are there any changes to the recommendations in the previous review of this rule with respect to any of the types of documents noted above? (An Ancillary Document Review Supplement should be completed if any changes are recommended with respect to an interpretive or policy statement.)

If the answer is “yes” to any of the questions above, identify the pertinent document(s) and provide a brief summary of the information that should be incorporated into the document.

Consideration should be given to incorporating information from the following WTDs issued after the initial review of this rule:

- **Det. No. 01-140, 22 WTD 26 (2003) provides information about what constitutes services in respect to constructing.**
- **Det. No. 01-077, 21 WTD 157 (2002) provides information about the measure of retailing B&O and retail sales tax when no gross contract price is stated, and the contractor improperly paid retail sales tax on materials suppliers and subcontractors.**
- **Det. No. 99-346, 19 WTD 891 (2000) provides information about what constitutes services in respect to constructing.**
- **Det. No. 99-152, 19 WTD 643 (2000) provides information about what constitutes services in respect to constructing.**
- **Det. No. 99-011R, 19 WTD 423 (2000) provides information about what constitutes services in respect to constructing.**
- **Det. No. 99-311, 19 WTD 385 (2000) provides information about what constitutes services in respect to constructing.**
- **Det. No. 99-159, 19 WTD 270 (2000) provides that where a corporation engages in construction activities on a “cost plus” basis, liabilities of the corporation, which are paid for by the real property owner/home buyer, are included in the total taxable contract price.**
- **Det. No 99-001, 18 WTD 420 (1999) provides information about what constitutes services in respect to constructing.**

Consideration should be given to incorporating information from the following ETAs into the rule:

- **ETA 51 provides information about the taxability of amounts received by a contractor to recover the cost of a performance bond.**



- **ETA 124** provides information about the taxability of reimbursements by a corporation to a corporate officer for construction services performed for the corporation by the corporate officer.
- **ETA 131** provides information about the tax treatment of amounts expended for labor and materials by a contractor-agent. The previous review of this rule recommended that the ETA be repealed. Upon further review, the document does contain useful information that should be incorporated into Rule 170.
- **ETA 198** provides information about whether sales tax is due on payments retained under a public works contract.
- **ETA 433** provides information about the tax consequences where a prime contractor assigns all or portions of the work contracted for to a subcontractor. The previous review of this rule recommended that the ETA be repealed. Upon further review, the document does contain useful information that should be incorporated into Rule 170.

3. Additional information: Identify any additional issues (other than those noted above or in the previous review) that should be addressed or incorporated into the rule. Note here if you believe the rule can be rewritten and reorganized in a more clear and concise manner.

This rule can be rewritten and reorganized in a clearer manner. This rule should be rewritten in the Department's current user-friendly format. Also, this rule is primarily organized by type of tax, with a definition section and a section dealing with speculative builders. It may be more user-friendly to reorganize the rule by the type of construction activity. Also, the definition section could be eliminated and the definitions incorporated throughout the rule as appropriate.

Relevant information contained in the Construction Tax Guide 2002 should be incorporated into the rule.

Information contained in WAC 458-20-223 (Persons performing contracts on the basis of time and material, or cost-plus-fixed-fee) should be incorporated into the rule.

4. Listing of documents reviewed: The reviewer need identify only those documents that were not listed in the previous review of the rule(s). Use "bullets" with any lists, and include documents discussed above. Citations to statutes, interpretive or policy statements, and similar documents should include titles. Citations to Attorney General Opinions (AGOs) and court, Board of Tax Appeals (BTA), and Appeals Division (WTD) decisions should be followed by a brief description (i.e., a phrase or sentence) of the pertinent issue(s).

Statute(s) Implemented:

- **RCW 82.04.040** ("Sale," "casual or isolated sale.")
- **RCW 82.04.050** ("Sale at retail," "retail sale.")
- **RCW 82.04.051** ("Services rendered in respect to"—Taxation of hybrid or subsequent agreements.)
- **RCW 82.04.060** ("Sale at wholesale," "wholesale sale.")
- **RCW 82.04.190** ("Consumer.")
- **RCW 82.04.250** (Tax on retailers.)



- **RCW 82.04.270 (Tax on wholesalers.)**
- **RCW 82.08.0274 (Exemptions -- Sales of form lumber to person engaged in constructing, repairing, etc., structures for consumers.)**
- **RCW 82.12.0268 (Exemptions -- Use of form lumber by persons engaged in constructing, repairing, etc., structures for consumers.)**

Interpretive and/or policy statements (e.g., ETAs, PTAs, and IAGs):

- **ETA 49 (Public road construction included in a lump sum general construction contract)**
- **ETA 51 (Reimbursements for performance bond premiums)**
- **ETA 94 (Out-of-state activities related to performance of local installation contract)**
- **ETA 124 (Services of a corporate officer to his corporation)**
- **ETA 198 (When sales tax is due on payments retained under public works contracts)**

Court Decisions:

- ***Riley Pleas, Inc. v. State*, 88 Wn.2d 933 (1977) (whether taxpayer, a construction company, owed sales tax on subcontracts and materials purchased by it in the construction of "turnkey" housing for several housing authorities on land the taxpayer owned).**
- ***Boise Cascade Corp. v. State*, 3 Wn. App. 78 (1970) (whether the taxpayer is entitled to a refund of sales tax assessed on an amount of construction cost of a pulp and paper mill attributable to payroll).**
- ***Wick Construction Co. v. State*, 65 Wn.2d 672 (1964) (whether a building contractor is liable for use tax on the value of form lumber that is either completely consumed in making forms for concrete, or used in making such forms and thereafter incorporated into the building as a component thereof).**
- ***Rigby v. State*, 49 Wn.2d 707 (1957) (whether the taxpayer is liable for sales tax on homes constructed on its own land where the homes were sold during construction and the buyers were entitled to possession of the property after closing).**

Board of Tax Appeals Decisions (BTAs):

- ***White-Leasure Development Co. v. Dep't of Rev.*, BTA Docket No. 55226 (2001) (whether the taxpayer is subject to retail sales tax as a prime contractor or, as a member of a joint venture with the landowner, is a "speculative builder").**
- ***Meier & Meier Development Construction Co., Inc. v. Dep't of Rev.*, BTA Docket No. 98-4 (1999) (taxpayer protests the Department's inclusion of certain costs in the "total amount of construction costs" of a building which it constructed on property owned by its shareholders).**
- ***Traffic Expeditors, Inc. v. Dep't of Rev.*, BTA Docket No. 96-83 (1998) (whether taxpayer's business of providing flagging, pilot car, and other traffic control activities performed for prime contractors on roads owned by the state should be subject to wholesaling B&O tax under RCW 82.04.270 and WAC 458-20-170).**
- ***Riplinger v. Dep't of Rev.*, BTA Docket No. 51234 (1998) (whether change order administration services provided by taxpayer are services in respect to constructing).**
- ***Steele v. Dep't of Rev.*, BTA Docket No. 47590 (1996) (whether the taxpayers, in rendering construction management services directly to a consumer, were subject to retailing B&O and retail sales taxes).**



- ***Beacham v. Dep't of Rev.***, BTA Docket No. 47414 (1996) (whether taxpayer rendered construction superintendent services as an independent subcontractor or as an employee).
- ***The Washington Water Power Co. v. Dep't of Rev.***, BTA Docket No. 85-169 (1986) (whether taxpayer is liable for use tax on the professional engineering services in connection with a wood burning plant).
- ***Reliable Builders, Inc. v. Dep't of Rev.***, BTA Docket No. 17074 (1978) (whether the taxpayer corporation was acting as a speculative builder when it built homes on land owned by two principal officers and shareholders of the taxpayer).
- ***Mullally Built Homes, Inc. v. Dep't of Rev.***, BTA Docket No. 9887 (1974) (whether the taxpayer was acting as a speculative builder in the building of an apartment building).
- ***Don Williams Co. v. Dep't of Rev.***, BTA Docket No. 4291 (1973) (whether architectural and design services are subject to retailing B&O and retail sales tax when the taxpayer later, under a separate agreement, performed construction work on the buildings so designed).
- ***Kalin v. Dep't of Rev.***, BTA Docket No. 848 (1970) (whether taxpayer acted as a prime contractor or a speculative builder on the construction of apartment buildings on land owned by a corporation in which the taxpayer and his wife were shareholders).

Appeals Division Decisions (WTDs):

- **Det. No. 01-140R, 22 WTD 37 (2003)** (whether taxpayer, a general partner of a limited partnership formed to develop and build a residential development, is liable for tax assessed on amounts received from the partnership).
- **Det. No. 01-140, 22 WTD 26 (2003)** (whether taxpayer, a general partner of a limited partnership formed to develop and build a residential development, is liable for retailing B&O and retail sales taxes assessed on amounts received from the partnership).
- **Det. No. 01-077R, 21 WTD 169 (2002)** (taxpayers, a land owner and a construction company, request reconsideration of Det. No. 01-077, which upheld the assessment of retailing B&O and retail sales taxes, and deferred sales or use tax with respect to construction, concluding that the construction company performed the work as a prime contractor for the land owner).
- **Det. No. 01-077, 21 WTD 157 (2002)** (the taxpayers, a land owner and construction company, protest the Audit Division's characterization of their relationship as consumer and prime contractor, which resulted in the assessment of retailing B&O and retail sales taxes, and deferred sales or use tax with respect to the construction of buildings for land owner).
- **Det. No. 01-028, 20 WTD 514 (2001)** (joint venturers in the construction and sale of a residence request refund of amounts the Department seized from their bank account in partial satisfaction of a warrant for unpaid retail sales tax on construction invoices, contending other members of the joint venture should be held solely liable for the unpaid taxes).
- **Det. No. 00-028, 20 WTD 32 (2001)** (whether the taxpayer performed construction services on state-owned roads and/or bridges, or on roads and/or bridges owned by a city, county, other political subdivision of the state, or the federal government).
- **Det. No. 99-346, 19 WTD 891 (2000)** (whether taxpayer's construction management services constitute services in respect to construction)



- **Det. No. 99-152, 19 WTD 643 (2000)** (whether taxpayer's construction management services constitute services in respect to construction).
- **Det. No. 99-176, 19 WTD 456 (2000)** (did the taxpayers form joint ventures with the co-venturers, who contributed land and capital, to construct houses as speculative builders and sell them to the general public).
- **Det. No. 99-011R, 19 WTD 423 (2000)** (whether payments to a company that provides management services related to the design, development, and construction of a grocery store are subject to retail sales tax).
- **Det. No. 99-311, 19 WTD 385 (2000)** (whether payments made by a contractor to a person for running the contractor's office are for services in respect to construction).
- **Det. No. 99-159, 19 WTD 270 (2000)** (where a corporation engages in construction activities on a "cost plus" basis, are liabilities of the corporation, which are paid for by the real property owner/home buyer, to be included in the total taxable contract price).
- **Det. No. 98-214, 19 WTD 201 (2000)** (whether a builder and financier developed and constructed multi-family housing projects as joint ventures).
- **Det. No. 99-066, 19 WTD 64 (2000)** (city utility division that owns and operates a railroad petitions for refund of retail sales tax assessed on funds it paid a private business to build a rail spur line on the business' land in exchange for a guaranteed level of traffic to the railroad for a minimum period).
- **Det. No. 98-215, 19 WTD 26 (2000)** (whether a company's services constitute services in respect to constructing when it provides professional assistance to owners, whereby owners can act as their own construction managers or general contractors).
- **Det. No. 98-194, 19 WTD 9 (2000)** (a company operating as a general manager of various limited partnerships and limited liability companies and receiving development fees, project management fees, and reimbursements for construction labor protests the assessment of retailing B&O and retail sales taxes on those fees and costs).
- **Det. No. 99-001, 18 WTD 420 (1999)** (architect protests the reclassification of income from the service B&O tax classification to the retailing B&O tax classification and the imposition of retail sales tax).
- **Det. No. 98-087, 17 WTD 384 (1998)** (whether a construction company performed custom construction for a related construction company).
- **Det. No. 97-189, 17 WTD 148 (1998)** (is taxpayer a speculative builder when it builds a structure on land that it does not have legal title to).
- **Det. No. 97-227, 17 WTD 99 (1998)** (whether taxpayer's services in helping a non-profit corporation in respect to the acquiring and remodeling of offices were rendered in respect to construction).
- **Det. No. 94-154, 15 WTD 46 (1995)** (whether a partnership engaged in business as a general contractor can be deemed the "owner" of the lots upon which it constructed homes when record title was held by one of its partners).
- **Det. No. 93-166, 14 WTD 022 (1994)** (was the taxpayer a prime contractor subject to an assessment of retailing B&O and retail sales taxes).
- **Det. No. 93-159, 13 WTD 316 (1994)** (whether taxpayer's construction management services are subject to retailing B&O and retail sales taxes).
- **Det. No. 93-022, 12 WTD 571 (1993)** (whether an asbestos abatement contractor is liable for sales/use tax on bags it purchases for disposal of hazardous asbestos materials).
- **Det. No. 92-204, 12 WTD 391 (1992)** (taxpayer protests an assessment of use tax and an audit finding that it is a speculative builder).



- **Det. No. 91-321, 11 WTD 515 (1992)** (whether a contractor is liable for retail sales tax on its acquisition of consumable supplies if the price charged to the customer by the contractor includes amounts for consumable supplies).
- **Det. No. 91-051, 10 WTD 406 (1990)** (taxpayer protests the assessment of use tax on its purchase of a performance bond on a contracting project, where the bond was never a part of the contract price).
- **Det. No. 90-366, 10 WTD 149 (1990)** (whether architectural fees related to the taxpayer's separate contract for construction are subject to service and other activities B&O tax or to retailing B&O and retail sales taxes).
- **Det. No. 90-74, 9 WTD 143 (1990)** (taxpayer, a general contractor and a general partner in several partnerships formed to build three projects, protests the assessment of retailing B&O and use tax).
- **Det. No. 89-248, 10 WTD 282 (1990)** (taxpayer petitions for correction of assessment reclassifying a fee from the service and other activities B&O tax classification to the retailing classification, and imposing retail sales tax on it).
- **Det. No. 89-548, 8 WTD 451 (1989)** (whether the taxpayer, who built a hotel as a speculative builder, is liable for use tax assessed on the purchases of furnishings such as furniture; kitchen, pool, and laundry equipment; fire extinguishers; and fireplace accessories).
- **Det. No. 89-252, 7 WTD 325 (1989)** (corporation protests the assessment of retailing B&O and retail sales taxes on amounts paid to it as a general contractor for the construction of a building on property owned by a partnership consisting of the individuals who formed the corporation).
- **Det. No. 89-112, 7 WTD 201 (1989)** (whether taxpayer is liable for use tax on a concrete form coating product where the product did not become a desirable or intended component part of the concrete).
- **Det. No. 89-63, 7 WTD 163 (1989)** (whether taxpayer, a general contractor, was acting as an agent or as a "prime contractor").
- **Det. No. 88-459, 7 WTD 79 (1988)** (whether taxpayer is liable for retailing B&O and retail sales taxes on amounts received under contracts requiring taxpayer to provide "erection engineers" for the purpose of providing advice and to help solve problems in respect to the installation of turbines).
- **Det. No. 88-239, 6 WTD 73 (1988)** (taxpayer, a city electric utility, protests the assessment of retail sales tax on engineering fees for supervising the installation of generators and turbines).
- **Det. No. 88-280, 6 WTD 205 (1988)** (taxpayer protests the assessment of retail sales tax on a construction contract which stated sales tax was included in the contract price).
- **Det. No. 88-199, 5 WTD 373 (1988)** (construction company protests the assessment of retailing B&O and retail sales taxes on the amount received as a member of a joint venture for the construction of a home).
- **Det. No. 88-183, 5 WTD 311 (1988)** (taxpayer requests a determination of the correct tax classification for its business activities providing "flagging" and "pilot car" services).
- **Det. No. 88-156, 5 WTD 205 (1988)** (taxpayer, a speculative builder, protests the assessment of retail sales tax on amounts claimed as "draws" which were paid to the taxpayer's son who performed construction labor and/or services for the taxpayer).
- **Det. No. 88-39, 5 WTD 125 (1988)** (taxpayer protests the assessment of retailing B&O and retail sales taxes on amounts received under a contract to perform certain



necessary preliminary development work with respect to an addition to a facility, where the taxpayer subsequently was awarded a contract to build the additions).

- **Det. No. 88-14, 5 WTD 19 (1988)** (taxpayer protests the assessment of retailing B&O and retail sales taxes on the construction of certain homes, contending that it was not a prime contractor in these transactions, but rather, a speculative builder).
- **Det. No. 87-270, 4 WTD 21 (1987)** (taxpayer seeks a refund of all B&O taxes and excess sales tax remitted in connection with the construction of an apartment on grounds it was a speculative builder).
- **Det. No. 87-93, 2 WTD 411 (1987)** (taxpayer protests a portion of an assessment of retailing B&O and retail sales taxes assessed on an unreported contract for the construction of a home, contending he was not the prime contractor during the period at issue).
- **Det. No. 87-61, 2 WTD 275 (1986)** (buyer and seller of commercial real estate jointly petition for correction of assessment of retail sales tax against buyer for full value of construction work performed by the seller under a contract, alleging that the bulk of the construction work was performed by the seller in the capacity of a speculative builder prior to the sale of the realty).
- **Det. No. 87-42, 2 WTD 201 (1986)** (taxpayer protests assessment of use tax on amounts paid to construction company for construction of speculative homes).
- **Det. No. 86-296, 2 WTD 19 (1986)** (construction company protests the assessment of retailing B&O and retail sales taxes on unreported construction income, contending the construction projects were speculative building rather than retail construction by a prime contractor).
- **Det. No. 85-231A, 1 WTD 309 (1986)** (whether amounts received by taxpayer from its affiliates represented payment for providing construction employees to the affiliates or were they merely reimbursements of payroll and related payroll expenses advanced by taxpayer as a common paymaster, and whether taxpayer constructed projects upon land owned by it, as a speculative builder, or did it construct the projects as a prime contractor upon land of or for housing authorities).

Attorney General Opinions (AGOs):

AGO 57-58 No. 31 (whether retail sales tax applies to the price of constructing schools).

Other Documents (e.g., special notices or Tax Topic articles, statutes or regulations administered by other agencies or government entities, statutes, rules, or other documents that were reviewed but were not specifically relevant to the subject matter of the document being reviewed):

- **Construction Tax Guide 2002**
- **WAC 458-20-223** (Persons performing contracts on the basis of time and material, or cost-plus-fixed-fee.)



5. Review Recommendation:

- ☒ **Amend**
- ☐ **Repeal/Cancel** (Appropriate when action is not conditioned upon another rule-making action or issuance of an interpretive or policy statement.)
- ☐ **Leave as is** (Appropriate even if the recommendation is to incorporate the current information into another rule.)
- ☐ **Begin the rule-making process for possible revision.** (Applies only when the Department has received a petition to revise a rule.)

Explanation of recommendation: Provide a brief summary of your recommendation, whether the same as or different from the original review of the document(s). If this recommendation differs from that of the previous review, explain the basis for this difference.

If recommending that the rule be amended, be sure to note whether the basis for the recommendation is to:

- Correct inaccurate tax-reporting information now found in the current rule;
- Incorporate legislation;
- Consolidate information now available in other documents (e.g., ETAs, WTDs, court decisions); or
- Address issues not otherwise addressed in other documents (e.g., ETAs, WTDs, court decisions).

This rule should be amended to correct inaccurate tax-reporting information and to incorporate legislation. Additionally, the rule should be amended to consolidate information now available in WAC 458-20-233, the Construction Tax Guide 2002, and the ETAs and WTDs identified above.

Consideration should be given to consolidating this rule and WAC 458-20-17001, as well as incorporating the information in WAC 458-20-172 regarding the clearing of land and moving of earth.

6. **Manager action:** Date: 4/28/03

☐ Reviewed and accepted recommendation

Amendment priority:

- ☐ 1
- ☒ 2
- ☐ 3
- ☐ 4